

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

MARION SUPERIOR COURT  
CIVIL DIVISION, ROOM NO. F12  
CAUSE NO: 49F12-0610-PL-044019

PORTER COUNTY BOARD OF )  
COMMISSIONERS, President ROBERT P. )  
HARPER; Vice-President JOHN A. )  
EVANS, And Board Secretary CAROLE )  
M. KNOBLOCK; BOARD OF )  
COMMISSIONERS OF LAPORTE )  
COUNTY; TOWN OF BEVERLY )  
SHORES; and TOWN OF PINES, )

Petitioners, )

v. )

GREAT LAKES TRANSFER, LLC and the )  
INDIANA DEPARTMENT OF )  
ENVIRONMENTAL MANAGEMENT, )

Respondents. )

**FILED**

(189) JUL 13 2007

*Elizabeth J. White*  
CLERK OF THE MARION CIRCUIT COURT

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

This cause comes before the Court on a Petition for Judicial Review of the September 12, 2006 Final Order issued by the Office of Environmental Adjudication ("OEA"), which granted the Indiana Department of Environmental Management's ("IDEM") Motion for Summary Judgment and Great Lakes Transfer, LLC's ("Great Lakes") Motion to Dismiss or for Summary Judgment. The issues having been heard before the Court, the Court now enters its Findings of Fact, Conclusions of Law and Judgment.

## A. FINDINGS OF FACT

1. The Petitioners are the Porter County Board of Commissioners, President Robert P. Harper, Vice President John A. Evans, and Board Secretary Carole M. Knoblock, the Town of Beverly Shores, the Town of Pines, and the Board of Commissioners of LaPorte County (collectively “the Petitioners”).

2. IDEM issued on September 9, 2005 Solid Waste Facility Permit 46-09 to Great Lakes, based on a permit application by Great Lakes that had been submitted to IDEM pursuant to 329 IAC 11-9-2, for the construction of a solid waste transfer station in LaPorte County on County Line Road, (the “Transfer Station”) which abuts both LaPorte and Porter counties and which is located south of the Towns of Pines and Beverly Shores.

3. On November 23, 2005, the Town of Pines filed a Petition for Administrative Review with the OEA. The Town of Pines alleged that the Transfer Station would cause increased traffic, resulting in dust, emissions, garbage, noise, and odors. Further, the Town of Pines alleged that the issuance of the Permit is contrary to IDEM’s Environmental Justice Strategic Plan. At the Stay Hearing on March 1 and 6, 2006, the Town of Pines alleged that operation of the Transfer Station will have a negative effect on wetlands at the Transfer Station.

4. The Town of Beverly Shores filed its Petition for Administrative Review with the OEA on November 28, 2005. The Town of Beverly Shores alleged that the Transfer Station would cause increased traffic, resulting in dust, emissions, garbage, noise, and odors. Further, the Town of Beverly Shores alleged that the issuance of the Permit is contrary to IDEM’s Environmental Justice Strategic Plan. At the Stay Hearing

on March 1 and 6, 2006, the Town of Beverly Shores alleged that operation of the Transfer Station will have a negative effect on wetlands at the Transfer Station.

5. The Porter County Board of Commissioners filed its Petition for Administrative Review on November 28, 2005. Porter County raised in its Petition the issue that the Transfer Station permit should not have been issued because Great Lakes has not received a valid driveway permit for road access onto County Line Road and because operation of the Transfer Station may lead to trucks exceeding the posted weight limit traveling County Line Road.

6. LaPorte County filed a Petition for Intervention on January 5, 2006. LaPorte County raised the issue of heavy truck traffic in the area in its petition and stated that it would take the case as it found it and would not unduly broaden the issues to be considered.

7. On January 12, 2006, the OEA ordered a deadline for amending the Petitions for Administrative Review of February 6, 2006. No amendments adding issues were filed.

8. The Petitioners requested a Stay of Effectiveness of the Permit. The OEA heard counsel for all parties, witnesses, and evidence during a stay hearing held on March 1, 2006 and March 6, 2006.

9. On April 10, 2006, IDEM filed a Motion for Summary Judgment, and Great Lakes filed a Motion to Dismiss and/or Motion for Summary Judgment. In response, on May 11, 2006, the Petitioners filed a Joint Motion in Opposition to both Motions for Summary Judgment and Great Lakes' Motion to Dismiss.

10. The OEA, on September 6, 2006, denied the Petitioners request for a Stay of Effectiveness of the Permit and issued Findings of Fact and Conclusions of Law. The Petitioners filed a Sur-Reply on September 11, 2006.

11. OEA heard oral argument on the Motions for Summary Judgment and Motion to Dismiss and Opposition on September 12, 2006.

12. OEA issued its Findings of Fact, Conclusions of Law and Final Order on the Motion to Dismiss and Motions for Summary Judgment in favor of Great Lakes and IDEM on September 12, 2006.

13. The OEA concluded in its September 12, 2006 Order (the "OEA Order") that the permit was not issued contrary to law and was not deficient as a matter of law.

14. To the extent any of these findings of fact are construed to be conclusions of law, they are hereby included as additional conclusions of law. To the extent that conclusions of law are construed to be findings of fact, they are hereby included as additional findings of fact.

## **B. CONCLUSIONS OF LAW**

### **The Standard of Review**

1. In reviewing the OEA Order in this judicial review proceeding, this Court is required to apply a deferential, appellate standard of review. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 104 (Ind. 1993); IND. CODE § 4-21.5-5-14. A trial court's review of a final agency action is confined to the agency record. IND. CODE § 4-21.5-5-11.

2. Petitioners have requested that this case be remanded to the OEA. This Court may remand the OEA Order only if it is:

(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

IND. CODE § 4-21.5-5-14(d); *Ind. Dept. of Env'tl. Mgmt. et al. v. Lake County Solid Waste Management District*, 847 N.E.2d 974, 981 (Ind. Ct. App. 2006). An agency's action is "arbitrary and capricious when it is made without *any consideration* of the facts and lacks *any basis* that may lead a reasonable person to make the same decision . . . ." *Lake County Solid Waste Mgmt. Dist.*, 847 N.E.2d at 983 (emphasis added) (*quoting Ind. Dept. of Env'tl Mgmt. v. Schnippel Constr., Inc.*, 778 N.E.2d 407, 412 (Ind. Ct. App. 2002)). *Accord Evansville Outdoor Advertising, Inc. v. Board of Zoning Appeals of Evansville and Vanderburgh County*, 757 N.E.2d 151, 161 (Ind. Ct. App. 2001), *trans. denied* (trial court should find agency decision arbitrary and capricious "only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case . . . ")

3. The reviewing court should give deference to an agency's interpretation of the laws and regulations it is charged with enforcing. *Indiana-Kentucky Elec. Corp. v. Comm'r. Indiana Dept. of Env'tl Mgmt.*, 820 N.E.2d 771, 777 (Ind. Ct. App. 2005); *Peabody Coal Co. v. Indiana Dept. Natural Resources*, 606 N.E.2d 1306, 1308 (Ind. Ct. App. 1992). If a statute is subject to different interpretations, the agency's interpretation is entitled to great weight. *Indiana-Kentucky Elec. Co.*, 820 N.E.2d at 777.

### Road Access and Traffic Safety

4. Petitioners have alleged that the OEA erred by finding that IDEM's permit was properly issued notwithstanding Petitioner's allegations that a lack of road access should have precluded issuance of the permit.

5. The requirement to show road access is included in 329 IAC 11-9-2(h):

Applications must include a plot plan or plans of the facility, including the following:

- (1) Access control measures such as fences, gates, or natural barriers.
- (2) A method of screening.
- (3) The general layout of the equipment
- (4) The traffic pattern.
- (5) Road access**
- (6) Surface water drainage

*Id.* (Emphasis added.)

6. The term "Road Access" is not defined in either statute or regulation.

However, "access road" is defined in 329 IAC 11-2-2 as:

"Access road" means a road that leads to the entrance of a solid waste processing facility, normally a county, state, or federal highway.

*Id.*

7. The regulation only requires that the permittee submit an application that contains a plot plan that shows how the facility will have road access, i.e. how and/or where the facility will connect to local roads. The OEA interpreted the "road access" term in 329 IAC 11-9-2(h)(5) as "how the facility will connect to local roads." It is common sense that "road access" as part of a plot plan can be interpreted as the means by which the on-site road will connect to the access road. The OEA's interpretation was reasonable.

8. If the Solid Waste Management Board had intended for the permittee to show such a permit, it could have drafted the rule requiring such a heightened showing, but it did not. *See* 329 IAC 11-9-2(a)(12) (requiring verification of the receipt of proper zoning permissions).

9. Given the difference between the regulations requiring “road access” and those regarding zoning, IDEM has interpreted the requirement of road access to mean that the permittee must show how it will construct its internal road (the road on its facility) to connect to the access road, i.e. the county road. Record, p. 410 (March 6, 2006 testimony of IDEM’s engineer, Lawrence Mansue).

10. IDEM is interested in how traffic coming into the facility will access scales and how trucks will enter the facility through the doors of the Transfer Station. Record, p. 355.

11. IDEM’s solid waste processing facilities rules specifically provide a provision stating that the permit issuance does not supersede local requirements:

- (a) The issuance of a permit does not:
  - (1) convey any property rights of any sort or any exclusive privileges;
  - (2) authorize any injury to persons or private property or invasion of other private rights or any infringement of federal, state, or local laws or regulations; or
  - (3) preempt any duty or comply with other state or local requirements.

329 IAC 11-11-4(a). This clarifies that the issuance of the Permit does not allow permittees to ignore local requirements, such as driveway permits, while allowing IDEM the freedom to not check on every local permitting requirement which will invariably differ from county to county.

12. In light of the regulations as drafted and the protection of a regulation clarifying that the issuance of the Permit does not exempt a permittee from local requirements, the OEA's affirmation of IDEM's interpretation of the rule allowing the issuance of the permit without confirmation of the Driveway Permit is reasonable. The Petitioners therefore cannot show that the OEA's decision regarding "road access" is arbitrary and capricious.

13. Traffic and road maintenance are not issues within IDEM or the OEA's jurisdiction. The Petitioners therefore cannot show that the OEA's decision regarding the failure of those issues to form a basis for denying a solid waste permit is arbitrary and capricious.

#### **Property Ownership and Local Zoning Issues**

14. The OEA found that there was no genuine issue of fact with regard to property ownership. Property ownership was not raised in the Petitions for Administrative Review or Intervention and thus was not properly before the OEA.

15. Nevertheless, the sole issue on this matter that the OEA considered was whether 329 IAC 11-9-2(a)(10) requires that a property transfer occur prior to issuance of a permit approval.

16. 329 IAC 11-9-2(a)(10) states that a complete application for a solid waste processing facility permit includes: Documents necessary to establish ownership or other tenancy of, including an option to purchase, the real estate upon which the facility to be permitted is located, including... the deed and evidence satisfactory to the Commissioner that ownership will be transferred to the owner prior to operation of the facility. This rule does not state that the applicant must own the property on which the transfer station will

be located when a permit application is complete. It states that the applicant must provide “*evidence satisfactory to the Commissioner* that ownership will be transferred to the owner prior to operation of the facility” (emphasis added). The documents provided to IDEM in Great Lakes Transfer’s permit application, which included a purchase agreement, were “evidence satisfactory to the Commissioner” that ownership would be transferred prior to operation of the facility.

17. The OEA concluded, reasonably, that the rules promulgated by the Solid Waste Management Board contemplate and expect that a permit applicant will not have finalized the appropriate property transfers at the time a permit is applied for, or even by the time a permit to construct is issued.

18. The OEA Order finding that the ownership of the land at the time of permitting was an invalid basis for denying the Permit is supported by substantial evidence and law.

19. The Record also contains substantial evidence that Great Lakes obtained and submitted to IDEM the proper proof that it had a special exemption and building permit. Record, p. 328. *See also* Record, p. 308 (letter from Attorney of the LaPorte County Board of Zoning Appeals.).

20. LaPorte County alleged during the stay hearing before the OEA that a local hearing would rescind the zoning and building permit. Record, p. 1410 (Questioning by Shaw Friedman). On March 21, 2006 a hearing was held concerning the special exemption and building permit, with the result that the BZA confirmed that Great Lakes’ special exemption had not expired and a new building permit should be issued to Great Lakes. Record, pp. 326, 329 (motion by Ed Kogut, BZA member). The OEA did

not act arbitrarily and capriciously in finding that the new information regarding a local hearing, after the permit was issued, was not a basis to overturn IDEM's decision.

21. The OEA's finding that Petitioners failed to submit evidence that Great Lakes' application did not contain sufficient information, truthful information, or adequate documentation to be complete was not arbitrary and capricious.

22. At the time that Great Lakes submitted the necessary zoning documentation, it was and continues to be valid. This was confirmed by a letter from the BZA Attorney, Robert C. Szilagyi. Record, p. 308.

23. IDEM requested and received proper documentation relating to the zoning and building permits for the site.

24. Petitioners' issues relating to local permitting only raise local issues outside of the jurisdiction of the OEA (many of which arose after IDEM issued the permit). They have not raised any issues to show that the issuance of the permit is contrary to statutes or regulations. Petitioners therefore fail to show that the OEA Order was arbitrary and capricious.

#### Wetland and Public Participation Issues

25. Petitioners have cited no authority, requirement or even a policy encouraging IDEM to require wetland information or to affirmatively initiate contact with the parks department personnel.

26. The OEA's finding that IDEM does not have the authority under the solid waste rules to require a wetland delineation report for a transfer station permit application is supported by the record. Record, pp. 417-418. IDEM does not have the authority to require the United States Army Corps of Engineers ("USCOE") to conduct or validate

any wetland determinations in light of Great Lakes' determination that wetlands will not be impacted and IDEM's determination that the issuance of the Permit will not result in discharge of pollutants to either waters of Indiana or the United States. Record, p. 362. Petitioners did not introduce any evidence or legal argument to the contrary. Further, this issue was not raised in the Petitions for Administrative Review or Intervention and thus was not properly before the OEA.

#### Environmental Justice and Public Participation

27. IDEM is required to give "notice" of the issuance of the permit. IND. CODE § 4-21.5-3-4(a). IDEM did this and Petitioners do not argue otherwise.

28. The record shows that the public was given the opportunity to comment, and in fact submitted written comments which were considered by IDEM. Record, pp. 364-365. *See also* Record, p. 1472 (Testimony of Dale Engquist, March 1, 2006, p. 96, indicating that he indeed did submit comments to IDEM), Record p. 320 (IDEM's responsiveness summary showing that it did consider public comments).

29. The OEA's finding that IDEM complied with its public notice requirements was reasonable.

30. The record shows that IDEM has implemented controls (through its regulations) requiring that the Transfer Station control waste water so that none will be discharged, but rather will be transferred to a local Sanitary District. Record, p. 320 (IDEM's responsiveness summary); *see also* Record, p. 361 (the Transfer Station, as designed, eliminates run-off pollution). All waste processing will occur inside buildings, designed to capture any liquids and wastes. *Id.*

31. Petitioners introduced no evidence whatsoever before the OEA that there will be pollution because of the operation of the Transfer Station – the OEA’s finding that Petitioners failed to show that the Transfer Station will affect the Towns or that environmental justice should be a concern was therefore not arbitrary and capricious.

32. IDEM and Great Lakes have shown that the OEA Order granting IDEM’s and Great Lakes’ Motions for Summary Judgment was supported by substantial evidence and that Porter County, LaPorte County, and the Towns of Pines and Beverly Shores are not entitled to reversal or any further proceedings as a matter of law.

**C. JUDGMENT**

Based on the foregoing Findings of Fact, Conclusions of Law and legal precedent, this Court FINDS that the OEA Order was not shown to be arbitrary or capricious or otherwise deficient at law and HOLDS that the OEA Order is affirmed and Petitions for Review denied. Petitioners have not demonstrated the OEA Order was “arbitrary and capricious,” without any consideration of the facts or lacks any basis that might lead a reasonable person to concur that the Permit should not have been issued. Because Petitioners are not entitled to a remand of this action to the OEA, the Court denies Petitioners’ Verified Petitions for Judicial Review.

SO ORDERED.

Dated: 7-13-07

Michael P. Keele  
Judge, Marion Superior Court  
Civil Division, Room No. F12

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